

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

No. 1803.

500

MARY DOD WALKER, APPELLANT,

vs.

DAVID WARNER, MARY A. STEWART, THOMAS W.
IRVING, AND MARTINA IRVING.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 6, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 1803.

MARY DOD WALKER, Appellant,

vs.

DAVID WARNER ET AL.

a Supreme Court of the District of Columbia.

At Law. No. 48078.

MARY DOD WALKER, Plaintiff,

vs.

DAVID WARNER, MARY A. STEWART, THOMAS W. IRVING, and
MARTINA IRVING, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed November 4, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 48078.

MARY DOD WALKER, Plaintiff,

vs.

DAVID WARNER, MARY A. STEWART, THOMAS W. IRVING, and
MARTINA IRVING, Defendants.

1. The plaintiff Mary Dod Walker sues the defendants, David Warner, Mary A. Stewart, Thomas W. Irving and Martina Irving to recover the following described land and premises in the City of Washington, District of Columbia, to wit: all of lot numbered eighty-nine (89) in Charles Thomas and Alexander I. Perry's sub-division of lots in Square numbered one hundred and eighty-one (181), as per plat recorded in Liber W. F., at Folio 110, one of the Records of the Surveyor's Office of said District, which the plaintiff claims as the fee simple owner thereof; and the plaintiff avers that she was lawfully possessed of said land and premises, and while she was so possessed, the defendants entered wrongfully into possession of the

same and withhold the possession thereof from the plaintiff and wrongfully exercise acts of ownership thereon.

And the plaintiff claims the possession of said real estate with the appurtenances and improvements thereon and costs of
2 suit.

2. The plaintiff aforesaid also sues the defendants aforesaid for that the defendants David Warner and Mary A. Stewart heretofore, to wit, on the first day of March, A. D. 1904, wrongfully entered into possession of the said land and premises described in the first count hereof, by their tenants, the defendants Thomas W. Irving and Martina Irving, who have since been and now are in the occupancy thereof, and have used the same as their own, to the injury and damage of the plaintiff; and since said last mentioned date, to wit, March 1st, 1904, said defendants David Warner and Mary A. Stewart have received from their co-defendants, Thomas W. Irving and Martina Irving, for the use and occupancy of said real estate and as rent, the sum of eighteen dollars (\$18) per month.

Wherefore, the plaintiff claims of the defendants David Warner and Mary A. Stewart for the use and occupation of said land and premises, from said first day of March, 1904, to the date of the commencement of this suit, and as mesne profits the sum of Three hundred and sixty dollars (\$360) and of all of said defendants the sum of eighteen dollars (\$18) a month, for the clear value of the use and occupation of said land and premises from the date of the commencement of this suit until the time of a verdict herein.

TUCKER AND KENYON,
Attorneys for Plaintiff.

Notice to Plead.

3 The defendants are to plead hereto on or before the twentieth day exclusive of Sundays and legal holidays occurring after the day of service hereof; otherwise judgment.

TUCKER AND KENYON,
Attorneys for Plaintiffs.

Defendants' Plea.

Filed November 15, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 48078.

MARY DOD WALKER, Plaintiff,
vs.

DAVID WARNER, MARY A. STEWART, THOMAS W. IRVING, and
MARTINA IRVING, Defendants.

Now come the defendants, and for plea to the plaintiff's declaration say that they are not guilty as therein alleged.

GITTINGS & CHAMBERLIN,
Attorneys for Defendants.

Joinder of Issue.

Filed November 17, 1905.

In the Supreme Court of the District of Columbia.

MARY DOD WALKER, Plaintiff,

vs.

DAVID WARNER, MARY A. STEWART, THOMAS W. IRVING, and
MARTINA IRVING, Defendants.

4 The plaintiff joins issue upon the plea of the defend-
ants.

TUCKER & KENYON,
Attorneys for Plaintiff.

Notice of Trial.

Messrs. Gittings and Chamberlin, attorneys for said defendants:

Take notice that the issue joined in the above entitled cause will
be tried at the next ensuing term of the Court.

TUCKER & KENYON,
Attorneys for Plaintiff.

Note of Issue.

Last pleading filed November 17th, 1905.

Attorneys for plaintiff, Tucker and Kenyon.

Attorneys for defendants, Gittings and Chamberlin.

TUCKER & KENYON,
Attorneys for Plaintiff.

5 *Memoranda.*

March 27, 1907.—Verdict for Defendant.

April 1, 1907.—Motion for new trial continued to April 6, 1907,
and January Term prolonged thirty-eight (38) days to settle excep-
tions.

Supreme Court of the District of Columbia.

FRIDAY, May 3, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright
presiding.

* * * * *

At Law. No. 48078.

MARY DOD WALKER, Pltf.,

vs.

DAVID WARNER, MARY A. STEWART, THOMAS W. IRVING, and MARTINA IRVING, Def'ts.

This cause coming on to be heard upon the plaintiff's motion for a new trial, the same having heretofore been argued and submitted to the Court, it is considered that said motion be, and hereby is overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiff take nothing by her suit, and that the defendants go thereof without day, and recover against the plaintiff, the costs of their defense, to be taxed by the Clerk, and have execution thereof.

Opinion of the Court.

Filed May 3, 1907.

At Law. No. 48078.

WALKER

vs.

WARNER ET AL.

There can be but small doubt but that at first impression the answer to Question 13 would seem to be competent; would seem to be susceptible of exercising some probative force upon the question of the decedent's intent respecting the property; And this is the very danger of it; for while it doubtless tends to prove her intent at the time of the declaration, yet does it tend to prove what intent possessed her later, when it is claimed she delivered the deed? From the fact that she had a certain intent in one year respecting property, does it at all follow that she had the same intent the next? If a man today declares that he intends to bequeath a property to his children, yet makes a deed of it to-morrow, can his declaration of to-day be brought against the grantee as showing that the deed carried no title, for lack of an intent to convey?

The more I reflect over the matter the more firm becomes the conviction that the ruling at the trial was correct; that had the jury had the answer, vague, indefinite uncertain as to time, it would have permitted them to find that a particular intent existed at the time in question, only because at a prior unidentified moment that intent may have momentarily prevailed. There is in the nature of the matter nothing which raises any presumption that if the intent once existed, it continued.

The motion must be overruled.

WRIGHT.

Order for Citation, etc.

Filed May 7, 1907.

In the Supreme Court of the District of Columbia, the 7th Day of May, 1907.

At Law. No. 48078.

MARY DOD WALKER, Pltff.,
vs.
DAVID WARNER ET AL., Def'ts.

The Clerk of said Court will enter an appeal by the plaintiff from the judgment herein and issue citation.

TUCKER & KENYON,
Attorneys for Pl'tff.

8 Filed May 13, 1907. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 48078.

MARY DOD WALKER
vs.
DAVID WARNER ET AL.

The President of the United States to David Warner, Mary A. Stewart, Thomas W. Irving, and Martina Irving, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal filed in the Supreme Court of the District of Columbia, on the 7th day of May, 1907, wherein Mary Dod Walker is Appellant, and you are Appellees, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 7th day of May in the year of our Lord one thousand nine hundred and Seven.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Asst. Cl'k.*

Service of the above Citation accepted this 7th day of May, 1907.

GITTINGS & CHAMBERLIN,
Attorneys for Appellee.

[Endorsed:] No. 48078. Law. Equity. Walker *vs.* Warner *et al.* Citation. Issued May 7, 1907. Served cop- of the within Citation on —. ———, Marshal. Tucker & Kenyon, Attorney-for Appellant. Filed May 13, 1907. J. R. Young, Clerk.

Memoranda.

May 14, 1907.—Appeal bond filed.

May 14, 1907.—Bill of exceptions submitted to Court.

Supreme Court of the District of Columbia.

FRIDAY, June 7, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 48078.

MARY DOD WALKER, Pltf.,

vs.

DAVID WARNER ET AL., Def'ts.

Now comes here the plaintiff by her Attorney and prays the Court to sign, seal and make part of the record, her Bill of Exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

Bill of Exceptions.

Filed June 7, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48078.

MARY DOD WALKER, Plaintiff,

vs.

DAVID WARNER ET AL., Defendants.

Be it remembered that the above entitled cause came on for hearing in said Court on the 26th day of March, 1907, before the Honorable Daniel T. Wright, an associate justice of said court, and a jury regularly empaneled to try said cause.

The plaintiff, Mary Dod Walker, to maintain the issue on her part joined, offered and gave evidence as follows, to wit:

CLARENCE F. DONOHUE, a witness for the plaintiff, after being duly sworn, testified that in September, 1898 he was a Notary Public in and for the District of Columbia; that on the 13th day of Septem-

ber, 1898, at the request of the plaintiff he called at her house, No. 202 A Street, Northeast, Washington, D. C., to take an acknowledgment of a deed. There lay upon the table a deed purporting to be a deed in fee simple from Rebecca Thompson to the plaintiff, Mary Dod Walker, and testified that he took the acknowledgment of

11 Rebecca Thompson, whom he saw sign said deed. There were present at the time, the plaintiff, Rebecca Thompson and himself. On cross-examination the witness testified that before taking the acknowledgment he asked the grantor, Rebecca Thompson, whether she knew what the paper was and she said she did; and she further stated that she wanted Mrs. Walker, the plaintiff, with whose family she had long lived, to have the property and everything she had. That when he reached the house he was shown into the parlour and Rebecca was called by the plaintiff and came into the room from the kitchen. She was a colored woman whom witness judged to be between 65 and 70 years of age; he had never seen her before, nor has he ever seen her since. She was introduced to witness by the plaintiff. Witness did not read the deed to grantor, nor was it read to her in his presence. No consideration passed from the plaintiff to the grantor in his presence. The deed was on the table when witness arrived at the house and it remained there while he was present and was there when he left, there having been no manual delivery of it.

The said deed was thereupon shown to witness and he identified it as the one which had been acknowledged before him.

The plaintiff to further maintain the issue on her part joined, offered and read in evidence the depositions of herself and her daughter, Alice D. Walker, taken on interrogatories (no cross-interrogatories having been filed) in Florence, Italy, on February 28th, 1907, before Jerome A. Quay, United States Consul and Commissioner under a commission duly issued to him by this Court.
12 and published in open Court March 20, 1907. The interrogatories and answers thereto were read to the jury. The substance and effect of the testimony of the witnesses taken under said commission were as follows:

MARY DOD WALKER, the plaintiff, being first duly sworn, testified that she was the plaintiff in this cause. "In 1898, I resided with my family and Rebecca Thompson at 202 A Street, Southeast, Washington, D. C. I was acquainted with Rebecca Thompson, deceased, from 1865 until the time of my coming over here in October, 1899. I think her death took place in 1905. My relations with her were of the closest character and practically all the time we were in the same house. My relations with her were always friendly and intimate. My family were always on intimate terms with her. I knew that Rebecca owned property. It was situated on O Street, Northwest, near 16th Street, in the City of Washington, D. C. She acquired it, I think, in 1874. She paid, I think, \$2,000 for it. She acquired the money from my father-in-law, Robert J. Walker. The deed referred to (which was attached to the interrogatories and is

the same deed which was offered in evidence at the trial and is hereinafter set forth) was in my possession until October 1899. Previous to leaving America, I delivered it into the hands by my brother, S. Bayard Dod, because my brother had charge of my papers and business. I have never had possession of it since. I saw Rebecca Thomson last at the sisters on Capitol Hill in September, 1899.

13 Rebecca could read and write, but with so much difficulty that she rarely did either. After parting with Rebecca I had many letters from her. I have never kept any of her letters. They were always written in some one's else handwriting. It would then be impossible for me to give the dates of her letters, but she was in continuous correspondence with me until a few weeks before her death. The letters were of no importance and in none of them did she ever refer to her property. Rebecca came into the family more than sixty years ago. She was given the money by my father-in-law, Robert J. Walker, by which she became free. After so many years of affectionate intercourse she was more attached to us than to any one else. Whatever money she had came to her from the Walkers."

ALICE D. WALKER, being first duly sworn testified as follows:—"My name is Alice D. Walker. I was born January 18th, 1870. I reside in Florence, Italy, with my mother, Mrs. Mary Dod Walker. Rebecca Thompson was a colored woman, lived in our family at the time of my birth and I do not remember the time that I did not know her. She continued to live with us when we moved from 5th Street, Northwest, in Washington, D. C. to No. 202 A Street, Southeast in that City. She remained in the family until her ill health made it necessary for her to leave us, in order that she might be cared for by the Sisters. My relations with her and my family's relations with her were most intimate and affectionate and her position was more like a member of the family than a servant. I

14 knew Rebecca owned a house on O Street, Northwest, near 16th Street in the City of Washington, D. C. and that the money with which she purchased it had been given her by the family. I have seen the deed which accompanies these interrogatories. I first saw the deed at No. 202 A Street, Southeast, Washington, D. C. September 13th, 1898 in the possession of Rebecca Thompson. I saw Rebecca Thompson sign and acknowledge the deed and place it in the hands of my mother. The deed remained in the hands of my mother until a few days before October 5th, 1899. My mother gave the deed into the keeping of my uncle, S. Bayard Dod, and as far as I know it has never been in her possession since that time. I saw Rebecca Thompson for the last time at the colored Sisters on Capitol Hill in September, 1899. Rebecca Thompson could read and write, but with great difficulty. Rebecca Thompson did write to my mother continuously and I always read her letters. As they were of no importance, they were always destroyed as soon as they were answered. I could not give the dates of her letters, but so far as I can recollect there was never any reference in them to her property."

At this stage of the reading of the deposition of Alice D. Walker, counsel for the plaintiff read in presence of the jury the last interrogatory propounded to her and attached to the commission to take her deposition as aforesaid, and the answer thereto, which said interrogatory and answer were as follows:—

Q. 13. "Do you know, or can you set forth, any other matter or thing, which may be of benefit or advantage to the parties at this issue in this case, or either of them or that may be material to the subject of this your examination, or the matters in question in this cause? If yea; set forth the same fully and at length in your answer. A. In answer to this interrogatory, I would say that even during the life time of her nearest relatives, her brother and his family, Rebecca used to often say that she wished my family to have her house on O Street. She made a will some years ago leaving the house to my mother, for the reason that the money with which the property was purchased had been obtained from our family, but fearing there might be some trouble about that, she had that will destroyed and had the deed drawn up conveying the property to my mother."

Thereupon counsel for the defendant- (before the trial the defendants not having made or filed any specific objection to the deposition) objected to said answer and moved to strike out the same, and said motion was granted and said answer ruled out and the jury instructed to disregard it, to which ruling of the Court the plaintiff by her counsel then and there excepted and said exception was duly noted upon the minutes of the Court.

The deed referred to and identified by the several preceding witnesses was thereupon offered and received in evidence and was in the words and figures following, to wit:

"This indenture, made this thirteenth day of September in the year of our Lord one thousand eight hundred and ninety-eight, by and between Rebecca Thompson, spinster, of the City of Washington, District of Columbia, party of the first part, and Mary Dod Walker, of the same City and District, party of the second part:

Witnesseth, That the said party of the first part, for and in consideration of one dollar, lawful money, to her in hand paid by the party of the second part, the receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, has given, granted, bargained and sold, aliened, enfeoffed, released, conveyed and confirmed, and does by these presents give, grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the party of the second part, her heirs and assigns forever, the following described land and premises, situate, lying and being in the City of Washington, District of Columbia and distinguished as Lot number eighty-nine in Perry and Thomas' subdivision of square numbered one hundred and eighty-one (Lot 89, Square 181) as the same is recorded in the proper office for such records.

Together with all and singular the improvements, ways, ease-

ments, right, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the party of the first part, of, in, to or out of the said land and premises.

To have and to hold the said land, premises, and appurtenances, unto and to the only use of the party of the second part, her heirs
 17 and assigns forever, so that the same shall not be subject in any wise to the future control of her present or any future husband.

In testimony whereof, the said party of the first part has hereunto set her hand and affixed her seal on the day and year first hereinbefore written.

REBECCA THOMPSON. [SEAL.]

Signed, sealed and delivered in the presence of
 CLARENCE F. DONOHUE.

DISTRICT OF COLUMBIA, *To-wit*:

I Clarence F. Donohue, a Notary Public in and for the District of Columbia, do hereby certify that Rebecca Thompson, party to a certain Deed bearing date on the 13th day of September, 1898, and hereto annexed, personally appeared before me in said District, the said Rebecca Thompson being personally well known to me as the person who executed the said deed, and acknowledged the same to be her act and deed.

Given under my hand and official seal this thirteenth day of September, 1898.

CLARENCE F. DONOHUE,
Notary Public, D. C."

[NOTARIAL SEAL.]

Endorsed: "Deed, Rebecca Thompson to Mary Dod Walker. Received for record on the 29th day of February, A. D., 1904, at 10:32 o'clock, A. M. and recorded in Liber No. 2796, at folio 240,
 18 *et seq.* one of the Land Records for the District of Columbia, and examined by Jno. C. Dancy, Recorder." Stamped with \$3.00 worth of United States Documentary Internal Revenue Stamps."

Further to maintain the issue on her part joined, the plaintiff offered and read in evidence the deposition of S. BAYARD DOD, a witness on behalf of the plaintiff, which was taken before Frank D. Blackistone, a Notary Public in the City of Washington, District of Columbia, on March 22nd, 1907, by consent of counsel for the respective parties to this cause. The testimony of said witness in substance and effect was as follows:

"My name is S. Bayard Dod and my residence is South Orange, New Jersey and I am President of the First National Bank of Hoboken. I am the brother of Mrs. Mary Dod Walker, the plaintiff in this suit. She is now in Florence, Italy, where she has been for six or seven years." (Witness then identified the deed heretofore

offered in evidence and hereinbefore set forth.) "The deed referred to was in my possession. When my sister left for Europe she handed me this deed with other papers to take care of for her. I retained possession of it until February, 1904, when I sent it to Rev. Mr. Clark of Washington, D. C."

On cross-examination, the witness testified that "I sent the deed to Mr. Clark immediately after Rebecca Thompson's death at
19 my sister's request. My sister was then in Europe. I heard of Rebecca Thompson's death from Mrs. Robert J. Walker, the wife of the brother of my sister's husband. My instructions were not to place this deed on record until after Rebecca Thompson's death. During the time I held the deed, up to the time of Rebecca Thompson's death, I paid no taxes or insurance upon the property for my sister nor did I collect the rents. During that time I was partly looking after my sister's property in this country. I collected rents from a piece of property which she owns in Washington, D. C. I know nothing about the deed in question except that my sister gave it to me with the request that I would record it as soon as I heard of Rebecca Thompson's death. I never examined the deed."

The plaintiff to further maintain the issue on her part joined, offered and gave the following additional evidence:

Reverend J. W. CLARK, a witness for the plaintiff, being first duly sworn, testified that he was the rector of St. James Episcopal Church, Washington, D. C. That a few days prior to February 29, 1904, the day of the recording of the deed aforesaid, as shown by the endorsement of the deed on the back thereof, he received the same from S. Bayard Dod, the brother of the plaintiff; that he, the witness, thereupon took the said deed to the office of the Recorder of Deeds in the District of Columbia, and there left it for record.

20 The defendant, MARTINA IRVING, was called as a witness for the plaintiff, and after having been duly sworn, testified that she and her husband, the defendant Thomas W. Irving, had been in possession prior to 1898 of the real estate in question; that prior thereto she had paid rent to Rebecca Thompson and continued to pay rent to her to the time of her death, at the rate of Eighteen dollars (\$18) per month, and after Rebecca Thompson's death had paid rent in the same amount to the defendant David Warner.

On cross-examination witness testified that she and her husband had occupied the premises for more than twenty years, that is, it was twenty years the first of last November. During that time had made repairs which they paid for out of the rent. Paid rent to Rebecca Thompson and in late years to Mr. Warner. Never paid any rent to Mrs. Walker. Never heard Rebecca Thompson say she no longer owned the property.

The defendant, DAVID WARNER, being called as a witness for the plaintiff, and being duly sworn, testified that he had collected rent of the premises in question, at the rate of Eighteen dollars (\$18) a

month from March 1, 1904, the date mentioned in the declaration, and had the amount so collected in his possession less amounts paid out for taxes and other expenses. He further testified that he made no claim to the premises except as executor under the will of Rebecca Thompson.

21 The plaintiff here offered to read in evidence the will of the said Rebecca Thompson for the sole purpose of showing that the parties of said cause all claimed under a common source, namely, Rebecca Thompson, but the defendants by their counsel in open court conceded that the defendants claimed under the common source, namely, Rebecca Thompson, and said will was not therefore read in evidence.

The plaintiff here rested.

The defendants, to maintain the issue on their part joined, offered and gave in evidence the following:

The defendant, DAVID WARNER, testified that since 1895 at the request of Rebecca Thompson he had collected the rents, paid the taxes and the fire insurance premiums on the property in question, and had turned over the balance of the rents to her until her death. Has since collected the rents and held them as her executor. Plaintiff has never made any demands upon him for the rents and he had never collected any for her, nor paid any to her. Present tenants, the Irvings, have been in possession all the time he has had anything to do with the property. They had on several occasions prior to Rebecca Thompson's death asked him to be allowed to make repairs, and after asking Rebecca Thompson and getting her permission, he consented and payments for such repairs were deducted from the rent. Further testified that Mr. S. Bayard Dod had written to him on several occasions and requested him to forward the tax bills on certain property owned by Mrs. Walker in the southeastern
22 section of the City, but that Mr. Dod had not on those occasions, nor at other times requested him to get tax bills on the property in question.

The defendants here rested.

Thereupon the plaintiff by her attorneys moved the court to direct a verdict for the plaintiff upon the ground that there was no controversy between the parties upon the facts brought out in evidence and that the evidence showed a delivery of the said deed and that the plaintiff was the owner of the property as grantee in said deed, and as such owner was entitled to possession of the property described in the declaration; but the court overruled said motion, to which ruling of the court, the plaintiff then and there duly excepted and her exception was noted on the minutes of the court before the jury retired.

After counsel for the respective parties had addressed the jury, the court charged the jury as follows:—

"The defendants are in possession of the real estate in controversy. Therefore, before the plaintiffs can prevail by your verdict, the plaintiffs must prove that *they are* the owners of the real estate. It does not make any difference whether the defendants own it or not, if the plaintiffs *are* not the owners, because if the plaintiff is not the owner, it is none of her business who has possession of it. And whether or not the plaintiff is the owner depends solely and entirely upon the question whether she acquired the property by this deed that has been offered in evidence. If she did acquire the
23 property by that deed, then the original owner, Rebecca Thompson, could not dispose of it by her will later. So, if Mrs. Walker acquired it by the deed, the making of a will later could not change that acquisition. If Mrs. Walker did not acquire it by the deed, then it does not make any difference whether there was a will or not, because if Mrs. Walker did not acquire it by the deed she could not acquire it by your verdict, because she cannot prove she is the owner of it, and the defendants will have to remain in possession.

Therefore, you see that the case turns upon the single primary question, whether by the deed Mrs. Walker became the owner of the property and Mrs. Thompson ceased to be the owner of it. Now, that brings me to the necessity of explaining the theory and practical operation of a conveyance of real estate. If you and I are debating about a purchase by me of your real estate, and you draw up a deed and sign it, and during a conversation on the matter simply hand me the deed to look at, to see whether it suits me, although you delivered the deed to me it is clear enough I am not the owner of the property, because you did not intend that I should be by that delivery of the deed. But if you deliver the deed to me, intending at the time you hand it to me to make me the owner, then the title passes and I am the owner. In other words, you owning the property and the title being in you, the title never can be divested from you until you are ready to let go of it. And until you deliver the emblem of title, the paper or deed, with the intention at the same time to deprive yourself of the ownership and pass the ownership to
24 the grantee, the title never passes out of you, no matter whether the physical possession of the paper does pass from you. But inasmuch as grantors, that is, the signers of the deeds, usually do not deliver them to the grantees unless they do intend to pass the title, the law has adopted as a rule of general experience, or the result of the general experience of mankind in respect to such matters, that where you find the naked hypothesis of the delivery of a deed by the grantor to the grantee, and that is all you know about the case, then the law will presume under those circumstances that at the time of the delivery of the deed the grantor intended to pass the title. If that is all you have, that presumption will control.

But when you start with the hypothesis of the fact, the mere naked hypothesis of the delivery of the deed by the grantor to the grantee, the minute you begin to bring other matters into the case, you change the original hypothesis, because such facts will be

brought into the original hypothesis as will show that the rule that is applicable to the general class of cases, is no rule in regard to the facts of the case you are considering, because the facts of the particular case may be such as will show that in the particular case the ordinary presumption ought not to attach to it.

Now, inasmuch as the question turns upon the intent of Rebecca Thompson at the time she delivered this deed to Mrs. Walker, providing you find that she actually delivered it to her, and inasmuch as intent is a condition of the mind, you cannot come at it by any direct physical observation of it. You must come at the
25 intent of another's mind, if at all, only by those avenues which would lead you to an understanding of it, which are generally the outward physical manifestations, acts and conduct, which tend to throw light on the intention of the parties.

Therefore, as bearing on the question of what the intent of the two, Mrs. Walker and Mrs. Thompson was, at the time of the delivery of the deed, you are entitled to take into consideration the mutual conduct of the two afterwards; how Mrs. Walker acted herself about it; how she permitted Rebecca Thompson to act about it, with a view to seeing whether their mutual conduct was that which would have been adopted by two people who had intended to pass the title, or whether their mutual conduct was contrary to that which would probably have been adopted by two people who understood there was no intention to pass the title. The burden of proof is on the plaintiff to show that she is the owner by the preponderance of evidence. The burden is on her to prove that the title passed at the time the deed was delivered. But the mere naked fact of delivery of the deed to her is one from which the presumption would arise in the absence of anything to the contrary as to the intent to pass the title.

I use that word 'mutual' conduct purposely and intentionally, because I do not want you to understand that you can take the conduct of Mrs. Thompson, as distinguished from the conduct of Mrs. Walker, as tending to show that Mrs. Thompson alone did not intend to pass the title by this deed. And when I said mutual conduct, I meant the conduct that was adopted by both of them
26 and which each knew the other was adopting and assented to.

Therefore, you are entitled to take into consideration the fact that Mrs. Walker never recorded this deed during the lifetime of Mrs. Thompson; you are entitled to take into consideration the fact that Mrs. Walker permitted Mrs. Thompson to exercise dominion and ownership and to retain possession of the real estate, collect the rents, make repairs and pay the taxes and the like,—if there are any other facts I don't now recall them—which tend to show that Mrs. Walker understood there was no intent to pass title at the time the paper was delivered. You can take such facts into consideration, and it is for you to decide whether in this case there are sufficient facts which tend to show that there was no intent to pass the title and make Mrs. Walker the owner, and sufficient to overcome the presumption of fact which the law draws out of the mere fact of delivery. If you find that in this particular case the

facts of it are such as to prove that there was no intent on the part of Mrs. Thompson to pass the title and to make Mrs. Walker the owner at the time of the delivery of this deed, then the title did not pass by the delivery of the deed, and Mrs. Walker never became the owner, although she did have the physical possession of the deed.

The burden is on the plaintiff to prove by a preponderance of the evidence that she is the owner at this time, which involves the burden on her of proving by a preponderance of the evidence that at the time of the delivery of the deed the title passed.

27 In order that you may not be misled by that statement as to the presumption of proof, she would raise a *prima facie* case in her favor by simply proving that the deed had been delivered to her. But that rule does not settle the matter, because, as I said, you have to take into consideration the other facts in determining whether or not weighed, by all the facts in the case, that presumption ought not to attach to this particular case.

In case you find in favor of the plaintiff then she will by your verdict be entitled to recover what are called the mesne profits of this land—from March 1, 1904, to the present time, the plaintiff would be entitled to recover the rents that have been paid on the property. If you find in favor of the plaintiff you will adopt as a form for your verdict, finding for the plaintiff, with so much as damages. If you find against the plaintiff you will find the general form of verdict and find for the defendant-. You may select your foreman and retire."

Thereupon counsel for the plaintiff, before the jury retired excepted to so much of the charge of the Court as is contained in brackets, upon the ground that as the question left to the jury was whether Rebecca Thompson intended to deliver the deed in question to Mrs. Walker as a deed of her real estate and thereby to divest herself of title to the property, the only acts or conduct proper to be considered by the jury as tending to show such intent were the acts and conduct of Rebecca Thompson, the grantor, while the portion of the charge so excepted to instructed the jury that they might

28 also consider as tending to show such intent, the acts or conduct of Mrs. Walker after the manual delivery of the deed, such as her failure to record the deed and permitting Rebecca Thompson to collect the rents, pay taxes and make repairs; and said exception was duly noted by the Court on its minutes before the jury retired.

Be it remembered that the substance and effect of all of the evidence in this cause is contained in the foregoing bill of exceptions, and all of said exceptions were reserved and duly noted on the minutes of the Court before the jury retired; and that said bill of exceptions is hereby made a part of the record in this cause, and at the request of counsel for the defendant- said bill of exceptions is signed sealed and settled now for then the 7th day of June, 1907.

DAN THEW WRIGHT, *Justice*.

Memorandum.

June 12, 1907.—Time in which to file record in Court of Appeals extended to July 15, 1907.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record according to Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 48078 at Law, wherein Mary Dod Walker, is Plaintiff, and David Warner, *et als.*, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3d day of July, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1803. Mary Dod Walker, appellant, *vs.* David Warner *et al.* Court of Appeals, District of Columbia. Filed Jul- 6, 1907. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

FEB 12 1908

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Clerks.*

Court of Appeals, District of Columbia.

JANUARY TERM, 1908.

No. 1803.

MARY DOD WALKER, APPELLANT,

vs.

DAVID WARNER, MARY A. STEWART, THOMAS W.
IRVING, AND MARTINA IRVING, APPELLEES.

BRIEF FOR APPELLEES.

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Court of Appeals, District of Columbia

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BRIEF FOR APPELLEES.

Statement of the Case.

The appellant, Mary Dod Walker, seeks to reverse a judgment entered against her upon the verdict of a jury. Claiming title under an alleged deed from one Rebecca Thompson, she brought an action of ejectment in the court below and named as defendants David Warner, executor under the last will and testament of said Rebecca Thompson; Mary A. Stewart, the devisee thereunder, and Thomas W. Irving and Martina Irving, his wife, who were and had been in possession of lot 89, in square 181, in the District of Columbia, the property sought to be recovered, as tenants of the said Rebecca Thompson for more than twenty years.

The sole question in the case is whether or not the deed under which appellant claims had ever been delivered to her by the grantor, Rebecca Thompson.

The appellant has three assignments of error, which we shall take up in the order in which they are set out in her brief.

First Assignment of Error.

The court below erred in overruling appellant's motion to direct a verdict in her favor.

As this exception is to refusal of the court to direct a verdict for the plaintiff upon the ground that there was no controversy between the parties upon the facts brought out in the evidence, it naturally results in a review of the evidence, and therefore we deem it best to bring the full evidence to the attention of the court in the outset, and from which it will be readily observed that the whole question in the case is whether or not the deed under which the plaintiff claims title was ever *delivered* by Rebecca Thompson, the grantor, to Mary Dod Walker, the plaintiff. The plaintiff and her daughter, Alice D. Walker, did not appear at the trial, but their testimony was given in the form of depositions taken in Florence, Italy, to which no cross-interrogatories were filed, and will be considered in order in which they were offered at the trial.

CLARENCE F. DONOHUE, the first witness offered by the plaintiff, testified as follows:

“That in September, 1898, he was a notary public in and for the District of Columbia; that on the 13th day of September, 1898, at the request of the plaintiff, he called at her house, No. 202 A street north-east, Washington, D. C., to take an acknowledgment of a deed. There lay upon the table a deed purporting to be a deed in fee simple from Rebecca Thompson to the plaintiff, Mary Dod Walker, and testified

that he took the acknowledgment of Rebecca Thompson, whom he saw sign said deed. There were present at the time the plaintiff, Rebecca Thompson, and himself. On cross-examination the witness testified that before taking the acknowledgment he asked the grantor, Rebecca Thompson, whether she knew what the paper was and she said she did; and she further stated that she wanted Mrs. Walker, the plaintiff, with whose family she had long lived, to have the property and everything she had. That when he reached the house he was shown into the parlor and Rebecca was called by the plaintiff and came into the room from the kitchen. She was a colored woman, whom witness judged to be between 65 and 70 years of age; he had never seen her before, nor has he ever seen her since. She was introduced to witness by the plaintiff. Witness did not read the deed to grantor, nor was it read to her in his presence. No consideration passed from the plaintiff to the grantor in his presence. The deed was on the table when witness arrived at the house and it remained there while he was present and was there when he left, there having been no manual delivery of it.

"The said deed was thereupon shown to witness and he identified it as the one which had been acknowledged before him" (R., 6).

We wish to direct the court's attention to the fact that the plaintiff, as shown by this testimony, is the prime moving factor in the signing of the deed. As shown by Mr. Donohoe's testimony, it was she at whose house the acknowledgment was taken; that he came at her request, and that the deed was in her possession, and it was she who called the grantor into the presence of the notary to have the acknowledgment taken. He did not read the deed to her, but asked her if she knew what it was, and upon her replying that she did, took her acknowledgment thereto. It appears from his testimony that no consideration passed, and that there was no manual delivery of the deed while he was there, but that he left the deed on the table where it was lying when he

entered the room. At this point we ask that it be noted particularly that there was no one present but the grantor, the plaintiff, and the notary.

The plaintiff's deposition (R., 7) follows:

"In 1898 I resided with my family and Rebecca Thompson at 202 A street southeast, Washington, D. C. I was acquainted with Rebecca Thompson, deceased, from 1865 until the time of my coming over here, in October, 1899. I think her death took place in 1905. My relations with her were of the closest character, and practically all the time we were in the same house. My relations with her were always friendly and intimate. My family were always on intimate terms with her. I knew that Rebecca owned property. It was situated on O street northwest, near 16th street, in the city of Washington, D. C. She acquired it, I think, in 1874. She paid \$2,000 for it. She acquired the money from my father-in-law, Robert J. Walker. The deed referred to was in my possession until October, 1899. Previous to leaving America, I delivered it into the hands of my brother, S. Bayard Dod, because my brother had charge of my papers and business. I have never had possession of it since. I saw Rebecca Thompson last at the Sisters', on Capitol Hill, in September, 1899.

"Rebecca could read and write, but with so much difficulty that she rarely did either. After parting with Rebecca I had many letters from her. I have never kept any of her letters. They were always written in some one's else handwriting. It would then be impossible for me to give the dates of her letters, but she was in continuous correspondence with me until a few weeks before her death. The letters were of no importance and in none of them did she ever refer to her property. Rebecca came into the family more than sixty years ago. She was given the money by my father-in-law, Robert J. Walker, by which she became free. After so many years of affectionate intercourse she was more attached to us than to any one else. Whatever money she had came to her from the Walkers."

The testimony of her daughter, Alice D. Walker, was as follows (R., 8):

"My name is Alice D. Walker. I was born January 18th, 1870. I reside in Florence, Italy, with my mother, Mrs. Mary Dod Walker. Rebecca Thompson was a colored woman, lived in our family at the time of my birth, and I do not remember the time that I did not know her. She continued to live with us when we moved from 5th street northwest, in Washington, D. C., to No. 202 A street southeast, in that city. She remained in the family until her ill health made it necessary for her to leave us, in order that she might be cared for by the Sisters. My relations with her and my family's relations with her were most intimate and affectionate and her position was more like a member of the family than a servant. I knew Rebecca owned a house on O street northwest, near 16th street, in the city of Washington, D. C., and that the money with which she purchased it had been given her by the family. I have seen the deed which accompanies these interrogatories. I first saw the deed at No. 202 A street southeast, Washington, D. C., September 13th, 1898, in the possession of Rebecca Thompson. I saw Rebecca Thompson sign and acknowledge the deed and place it in the hands of my mother. The deed remained in the hands of my mother until a few days before October 5th, 1899. My mother gave the deed into the keeping of my uncle, S. Bayard Dod, and as far as I know it has never been in her possession since that time. I saw Rebecca Thompson for the last time at the colored Sisters', on Capitol Hill, in September, 1899. Rebecca Thompson could read and write, but with great difficulty. Rebecca Thompson did write to my mother continuously and I always read her letters. As they were of no importance, they were always destroyed as soon as they were answered. I could not give the dates of her letters, but so far as I can recollect there was never any reference in them to her property."

We shall comment but briefly upon this testimony, but particularly refer to that portion of the daughter's testimony in which she states that she saw Rebecca Thompson sign and acknowledge the deed and place it in the hands of her mother. This statement cannot be reconciled with the testimony of the notary, who stated there was no one present when Rebecca Thompson signed the deed and took the acknowledgment but the plaintiff, the grantor, and himself.

Mr. S. Bayard Dod, the brother of the plaintiff, testified as follows (R., 10):

"My name is S. Bayard Dod and my residence is South Orange, New Jersey, and I am president of the First National Bank of Hoboken. I am the brother of Mrs. Mary Dod Walker, the plaintiff in this suit. She is now in Florence, Italy, where she has been for six or seven years." (Witness then identified the deed heretofore offered in evidence and hereinbefore set forth.) "The deed referred to was in my possession. When my sister left for Europe she handed me this deed, with other papers, to take care of for her. I retained possession of it until February, 1904, when I sent it to Rev. Mr. Clark, of Washington, D. C."

The cross-examination (R., 11) revealed the fact that witness was instructed not to place the deed on record until the grantor's death, and that during the six years the deed had been in his possession unrecorded; that, although he was looking after his sister's property in this city, he had paid no taxes or insurance upon the property and had collected no rents, although he had collected rents from other property which she owned in this city. The deed was recorded by the Rev. J. W. Clark, who testified as follows (R., 11):

"That he was the rector of St. James' Episcopal Church, Washington, D. C. That a few days prior to February 29th, 1904, the day of the recording of the deed aforesaid, as shown by the endorsement of the deed on the back thereof, he received the same

from S. Bayard Dod, the brother of the plaintiff; that he, the witness, thereupon took the said deed to the office of the recorder of deeds in the District of Columbia, and there left it for record."

One of the tenants, the defendant, Martina Irving, testified (R., 11) as follows:

"That she and her husband, the defendant Thomas W. Irving, had been in possession prior to 1898 of the real estate in question; that prior thereto she had paid rent to Rebecca Thompson and continued to pay rent to her to the time of her death, at the rate of eighteen dollars (\$18) per month, and after Rebecca Thompson's death had paid the rent in the same amount to the defendant David Warner."

Upon cross-examination this witness stated that she and her husband had occupied the premises for twenty years last past, and had made repairs thereon, for which they paid out of the rent; that they had never paid any rent to Mrs. Walker, but had paid the rent to Rebecca Thompson, and latterly to the defendant Warner, and that Rebecca Thompson had never told them that she no longer owned the property.

The next testimony was that of the defendant David Warner, who was called as a witness for the plaintiff and testified as follows (R., 11):

"That he had collected rent of the premises in question, at the rate of eighteen dollars (\$18) a month, from March 1, 1904, the date mentioned in the declaration, and had the amount so collected in his possession, less amounts paid out for taxes and other expenses. He further testified that he made no claim to the premises except as executor under the will of Rebecca Thompson."

The plaintiff then offered Rebecca Thompson's will in evidence, but the defendants conceded that all parties claimed under her (R., 12) and closed their case after the deed (R., 9) had been admitted in evidence.

The defendants rested their case upon the aforesaid showing by the plaintiff and upon the defendant David Warner's testimony (R., 12) that at the grantor's request he had collected the rents of the property since the year 1895 and up to the time of her death, since which he had collected the same and held them as her executor; that he paid all taxes and insurance premiums and attended to the repairs, for which he paid out of the rents. The plaintiff had never made any demand upon him for the rents, and that he had never collected any for her, nor paid any to her. The Irvings had been in possession all of the time he had anything to do with the property; that S. Bayard Dod had written him on several occasions for tax bills on the other property owned by Mrs. Walker, but had never made any request for such bills on the property in question.

It was at this point that the plaintiff asked the court to direct a verdict in her favor, and the refusal to do so was made her first assignment of error.

We submit that the court was entirely in the right in leaving the case to the jury, as the delivery of the deed was one of fact, and the conclusion that the plaintiff was the owner of the property and entitled to possession could only be established by the determination of the fact that there had been a delivery.

Galbraith *vs.* Zimmerman, 100 Pa. St., 374.

Floyd *vs.* Taylor, 34 N. C. (12th Ired.), 47.

Dearmond *vs.* Dearmond, 10 Ind., 191.

Barry *vs.* Hoffman, 6th Md., 78.

"Though the possession of the deed by the grantor is *prima facie* evidence of title in him, the question of *delivery* is one for the jury to determine from the evidence on that point" (Fenton *vs.* Miller, 94 Mich., 204).

"Where there is insufficient proof of the signing of the deed it may be left for the jury to determine, from these and other circumstances in the case, if there is satisfactory evidence of sealing and *delivery*" (Lesh's Lessee *vs.* Levan, 2 Dall., 96).

"The court can only conclude a delivery where it is a positive inference of law" (Hunt *vs.* Swazey, 55 N. J. L. (56 Vroom), 33).

"Where such facts are shown that only delivery can be inferred, the question is for the jury. The delivery of a deed, either as an escrow or absolutely, is an act including intent. It may be by words, without act, or by both combined. Hence it is always a question of fact, resting *in pais* and to be found by the jury under proper instructions from the court" (Roll *vs.* Rea, 50 N. J. L. (21 Vroom), 264).

In the latest case on the subject, Central Trust Co. *vs.* Stoddard, 88 Pacific, 806, decided by the Court of Appeals in California February 25, 1907, the court said:

"Whether or not a deed is *delivered* is a question of fact, to be determined in each case by its own particular circumstances. It must appear, in order to constitute a good delivery, that the grantor intended to part with the title to the property described in the deed, and that he parted with the deed by placing it beyond recall."

To the same effect are the latest decisions on the subject, viz:

Russell *vs.* Mitchell, 223 Ill., 438.

Garrett *vs.* Goff (W. Va., 1907), 56 S. E., 351.

Oswald *vs.* Caldwell, 225 Ill., 224.

Sappingfield *vs.* King (Ore., 1907), 89 Pacific, 142.

The case of Dwinell *vs.* Bliss, 58 Vt., 353, was a case very similar to the one at bar. While that was an equity proceeding by the grantor, and afterward continued by her executor, to set aside a deed, the whole case turned on the delivery.

The grantor, a woman aged 76 years, executed a deed of a farm on which she lived to the defendant, who paid no consideration for the deed except his expense in getting it executed and recorded. It appeared that she afterward demanded a reconveyance, and that she made her will a num-

ber of times, and that 17 days before the deed was executed the defendant had a talk about the grantor making a will. The special master to whom the case was referred found that the grantor did not know that she could not alter the deed at any time she wished after it was executed and delivered, the same as she could a will, by making a new one, but that the grantee knew that this deed, if once executed and delivered, could not be altered without his consent. He further found that although the grantee left the deed in possession of the defendant, at the time it was executed, that she did not deliver it to him as a deed at any time.

The court said after quoting from 2 Washburn on Real Property, p. 578,

“So if the grantor throws the deed upon the table, intending the other party to take it, and he does so, it will be a delivery though nothing be said. If, however, the deed is laid upon the table without any such intention, and the grantee takes it up, it will not be a delivery. Hence the mere possession of the deed by the grantee, although, if nothing more is shown, a delivery will be presumed, does not determine that there has been a delivery of it. It depends upon whether such possession has been acquired with the intention of the grantor that he should receive it as an executed deed to take effect therewith. The intention with which the grantor parted with the possession of the deed is a fact to be determined by the trier.”

Stevens vs. Castil, 63 Mich., 111, was an action in ejectment, and there the plaintiff insisted that the case should not have gone to the jury, but a verdict directed in his favor upon the testimony. In that case declarations made by the grantor to the recorder at the time he filed the deeds for record were offered in evidence. The appellate court held that there was no error in submitting the case to the jury on the question of delivery, and also that the declarations were admissible as part of the *res gestæ*.

In the case of *Mills vs. Gove*, 20 Pick., 28, 35, the facts were:

Wheeler, one of the attesting witnesses to the execution, testified that he saw Gove sign the deed, and that he and Harrington subscribed their names as witnesses; that Gove, who was standing by the side of Mills at a desk, took the deed up after signing it, put it before Mills on the desk, and remarked, "There is no go back from that"; that this was before Wheeler and Harrington had subscribed their names as witnesses; that soon after subscribing his name he (Wheeler) left the room, leaving Mills and Gove writing, the deed remaining on the desk before them. Harrington, the other subscribing witness, testified substantially to the same facts.

The court said:

"The plaintiff's counsel rely on the testimony of these witnesses and on the possession of the deed by the plaintiff Mills as good and sufficient evidence of a delivery, and consequently as contradictory to the denial and answer of the defendant Gove in this particular. This evidence, unexplained, would undoubtedly be sufficient proof of a delivery, and so would the possession of the deed by Mills alone, if unaccounted for, be good *prima facie* evidence of delivery. But the question in this case is not whether the plaintiff has produced sufficient *prima facie* or presumptive proof of a delivery, but whether the plaintiff has proved the fact by direct testimony. There is no proof of a delivery of a deed into the hands of Mills, but a deed may be delivered to a party by words without any act of delivery, as 'if the writing sealed lieth on the table, or the feofer or the obligor saith to the feofee or obligee, go and take of the writing it is sufficient for you, or it will serve the turn, or take it as any deed, or the like words, it is a sufficient delivery' (Co. Lit., 36; Com. Dig. Falt., a 3; 4 Stark. Ev., 477). If, however, a party shows a writing on a table and says nothing, and the other party takes it up, this does not amount to a delivery, unless it be found to be put there with the intent to be delivered to the party, or to be taken

up by him' (Com. Dig. Fait., a 4; *Chamberlain vs. Staunton's case*, 1 Leon, 140)."

"Evidence that plaintiff testator, 5 years before his death, executed and acknowledged a deed to half his farm to defendant, who was his adopted daughter; that he kept the deed with his will, and that a few days before his death he handed it to the defendant's niece, telling her to put it away carefully, and that it would be of use after he was gone, is sufficient to justify the court in submitting to the jury the question whether the deed had been delivered." *Lutes vs. Reed*, 138 Pa. St., 191).

"Where the execution of a deed has been proved by a subscribing witness and by evidence of the grantor's repeated declarations, subsequently and voluntarily made, and evidence has been given that the deed has been ever since the execution in the grantee's possession, with the knowledge and acquiescence of the grantor, the question of delivery should be submitted to the jury" (*Harden vs. Hays*, 14 Pa. (2 Harris, 91).

The only direct testimony on the point of the delivery of the deed was in the deposition of Alice D. Walker (R., 8), wherein she stated that she saw Rebecca Thompson sign and acknowledge the deed and place it in the hands of her mother; which testimony was absolutely contradicted by the notary, who testified for the plaintiff to the effect (R., 7) that Alice D. Walker was not present when the deed was signed and there was no manual delivery of it at that time. This conflict alone was sufficient to make it imperative that the jury take the case.

Moreover, if Miss Walker had been correct in this testimony and had seen the grantor place the deed in the hands of her mother, the plaintiff, the mere fact of her having placed it there would not justify the court in concluding that there had been a delivery, as a delivery is entirely a question of intent and cannot be consummated unless a divesture of title is intended by the grantor and accepted by the grantee. Therefore it was for the jury to say, even if the grantor had

placed the deed in the hands of the grantee, whether it was done with the intention of forever parting with the title to the property and placing it absolutely beyond her reach and control for all time.

Austin vs. Fendall, 2 McA., 262.

Gould vs. Day, 94 U. S., 405.

Hill vs. McNichol, 80 Me., 209.

Steven vs. Caskil, 63 Mich., 111.

Gunnell vs. Cockerill, 79 Ill., 79.

Cohn vs. Cohn, 24 S. C., 579.

Byars vs. Spencer, 101 Ill., 426.

Brown vs. Brown, 66 Me., 316.

Scott vs. Scott, 95 Mo., 300.

Stevens vs. Stevens, 150 Mass., 557.

Brown vs. Westerfield, 53 Amer. St. Rep., 546, and exhaustive notes.

Hibbard vs. Smith, 67 Cal., 547.

In *Wilson vs. Wilson*, 158 Ill., 567, upon the question of the delivery of a deed rested the decision in the case. The deed had been placed by the grantor in the hands of one of the grantees, but the court decided that it was an attempt to make a testamentary disposition of property without complying with the statute of wills.

The court decided—

“that Colonel Wilson (the alleged grantor) always treated the land in question as his own, as well subsequently as prior to the alleged delivery of the deed. The land remained on record in him until after his death, up to which time he paid the taxes thereon with his own money. At different times subsequent to said alleged delivery he made repairs on the premises, leased the land to tenants, collected the rents for his own use, advertised the land for sale in a public newspaper and made and delivered a mortgage deed thereon. All of these facts were done with the knowledge and acquiescence of the defendants. Such a state of fact is not at all consistent with the

claim that Colonel Wilson delivered the deed to the defendants. The mere placing the deed in the hands of one of the grantees did not, of itself, necessarily constitute delivery. In such a case the inquiry is, What was the intention of the parties at the time? and that intention, when ascertained, must govern (*Jordan vs. Davis*, 108 Ill., 336; *Bovee vs. Hinde*, 135 Ill., 137; *Oliver vs. Oliver*, 149 Ill., 542). * * * To constitute delivery of a deed, it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time and he should lose all control over it. A deed for an interest in land must take effect upon its execution and delivery or not at all."

See also *Oswald vs. Caldwell*, 225 Ill., 224 (1907).

In *Curry vs. Colburn*, 99 Wis., on page 321, the court said:

"The ancient rule that a deed cannot be delivered in escrow to the grantee in no way conflicts with our conclusions. A delivery in escrow contemplates complete loss of control over the deed. Here the incomplete deed was handed to the grantee, to take to his lawyer for inspection. * * * That parol evidence is admissible to show that a written instrument has never been delivered so as to bind the parties thereto is established by the following cases: *Gibbons vs. Ellis*, 83 Wis., 434; *Price vs. Hudson*, 125 Ill., 284; *Brackett vs. Barney*, 28 N. Y., 333; *Roberts vs. Jackson*, 1 Wend., 478; *Reichart vs. Wilhelm*, 83 Iowa, 510. It is not competent to control the effect of the deed by parol evidence, when it has once taken effect by delivery, but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor and those claiming through him are estopped in some way from asserting the non-delivery of the deed."

Appellant's counsel have directed considerable energy to their first assignment of error and cited many authorities,

including *Neuman vs. Baker* and *Bieber vs. Gans*, decided in this court, but have misconceived the applicability of those decisions to the case at bar. They direct particular attention to that portion of the court's charge in which the jury was instructed that "the title never can be divested until the owner is ready to let go of it, and this portion is segregated and made to stand alone in the argument that follows it, without showing that it is explained by the qualifying words represented by stars, wherein the court made it plain to the jury that a presumption of intent to divest title would arise and be controlling if it were found that the grantor had *delivered* the instrument.

If the doctrine as laid down by the trial court be not the law, then the mere physical possession of a deed by the grantee completes a contract of conveyance, and the grantor is divested of title without his consent, regardless of the manner in which the grantee acquired the deed. *Neuman vs. Baker* and *Bieber vs. Gans* decide no such thing and simply apply the law of evidence that estops a grantor from contending, after he has physically delivered a deed, that it is not the instrument it purports to be, but that there are other conditions, though not stated therein, which make it ineffective. The decision in *Bieber vs. Gans* stated specifically that "there are, of course, cases in which, although sealed instruments have gotten into possession of a party to them, they are held never to have taken effect," but they are cases in which the possession by the party was secured either wrongfully, accidentally, or inadvertently, and not where a delivery was intentionally made to a party himself.

In all of the cases further cited and directed against that portion of the court's charge there had been an actual handing over of the deed by the grantor, which, when the facts were shown, the law pronounced a delivery and sealed the mouth of the grantor from contending that he intended something different. The appellant has cited no case where the fact of delivery was not established that holds that a grantor

has been divested of his title without his consent unless he has done something or said something that made it appear that he intended to deliver.

Whether a deed has been delivered or not is a question of fact upon which, from the very nature of the case, parol evidence is admissible. But the question whether a deed *when delivered* shall take effect absolutely or only upon the performance of some condition not expressed therein is not involved in this case. There is a vast number of reported decisions and diversity of opinion as to what constitutes a valid delivery, and it is still an open question, to be determined by the particular facts of each case. (See Warvelle on Abstracts (1907), sec. 197.) No decision quoted by appellant applies to the facts in this case, and none is authority for the contention that the charge as given does not correctly state the law applicable hereto. It must be borne in mind that the grantor is dead. We have not a situation where the grantee has testified that a living grantor has done certain acts that constitute a delivery to her, and the grantor has sought to contradict her by oral testimony, but what we have is a grantee who can show at the most only *prima facie* delivery arising out of the mere physical possession of a deed seeking to deny to the relatives of the grantor the right to have it determined, from the light of surrounding circumstances, if the mere holding of a paper writing has divested the grantor of title and invested the grantee therewith.

It is submitted, in the sense of good reason and in view of following authorities, that the only correct way in which such a question could be rightfully determined would be, as the court said, to find from the facts in this particular case whether there was an intention on the part of the grantor to pass the title, and that the deed so came into the hands of the grantee. That the instruction was correctly given is borne out by a multitude of authorities; for instance, The Amer. & Eng. Enc. of Law, vol. 9, 2d ed., at page 153, in the articles on deeds, says:

“Delivery is a word, act or both combined, by which a grantor express a present *intention to divest himself of title* to property described in an appropriate deed;”

and, continuing on page 154, says:

“The real question of delivery is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered.”

This text is supported by a reference to cases from Alabama, California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, West Virginia, and Wisconsin.

And in the supplement to that work, in volume 2, at page 392, the decisions of those States are added to by decisions from Arkansas, Delaware, Kentucky, Mississippi, and Rhode Island. We refer to some of these authorities in detail later on in our brief.

In spite of appellant's contention to the contrary, the trial court's charge that delivery of the emblem of title must be made with the intention at the same time to deprive the grantor of ownership is unquestionably the law. This court had the question, but with other considerations, before it in the *Bunten* case, and there stated it to be a question of intention. But *Newman vs. Baker* and *Bieber vs. Gans*, as heretofore contended, have no application to the case at bar. In *Carusi vs. Savary*, 6 App. D. C., 330, this court said:

“As between grantor and grantee, the question of delivery is one to be determined by a fair preponderance of the evidence.”

We do not deem it necessary to make further reference to that portion of appellant's brief which contends that a delivery cannot be made by grantor to grantee in escrow, or

that parol evidence is inadmissible to establish conditions not stated in the deed, because the court is not called upon to pass upon that question.

Appellant, to reach that argument, has assumed for a major premise that the deed was delivered, while the very point in the case, and the one left to the determination of the jury, was whether the facts and circumstances showed the foundation for that premise. The jury decided that it did not, and we submit that this court will not disturb that finding of fact unless it be shown, by more applicable authorities, that the court misstated the law. The fallacy of appellant's contention and criticism of the court's charge is boldly apparent in the statement on page 11 of her brief, viz:

“So that in the case at bar, if it was the intention of Rebecca Thompson, the grantor, and Mrs. Walker, the grantee, or either of them, at the time of the execution and delivery of the deed, that the deed should not take effect until some future time, or on the happening of some future event, such as Rebecca's death, *and this was undoubtedly their intention*—nevertheless the title passed upon the delivery and the appellant became the owner of the property, irrespective of such intention.”

Was it not for the jury and not appellant to say what were their intentions, and does not appellant concede right there that the whole question of delivery is one of intention?

Appellant next follows with extended argument and citations on the question of retention of control of a deed on the part of the grantor. There is absolutely nothing in the record to show that it ever passed out of the possession of the grantor or beyond her control, by any act of hers, except the testimony of the grantee's daughter, which was flatly contradicted by the notary.

In appellant's brief, on page 17, she seriously criticised that portion of the court's charge on page 14 of record which refers to the burden of proof, but there was no exception

taken in the court below to anything the trial judge said in reference to the burden of proof, which will readily be seen by referring to the exception to the charge contained upon page 15. Certainly if this court is to uphold its repeated decisions and those of the Supreme Court of the United States, it should be pointed out in a case of this character that counsel cannot in the trial court agree to the law as stated by the court in its charge, and then be heard to criticise and assign as error something that was never called to the court's attention at the time. The reason of the rule is patent. If the court commits error in charging the jury, it should have the right and opportunity to rectify it before the case is finally placed in the hands of the jury for determination. We all know from experience that a charge of a *misit prius* judge may appear all right and be perfectly satisfactory to all parties in interest at the time of rendition, yet when placed in cold type may appear to have an entirely different meaning. It is to the interest of all litigants, as well as the court, that the rulings of this court and the Supreme Court of the United States as repeatedly laid down, that an exception to the judge's charge should be specifically stated, should be upheld. It is perfectly apparent in this case that the trial court gave the appellant all the benefit to which she was entitled, or claimed to be entitled, in his charge to the jury.

In *Evans vs. Schoonmaker*, 2 App. D. C., the court, on page 70, said:

"Of these the third may be eliminated at once from the case. There was no exception taken to the charge of the court or to any part of it; and, of course, it is an elementary rule of practice that alleged errors in the rulings of a trial court cannot be reviewed on appeal unless exception was reserved to them at the trial."

See also—

Washington R. R. Co. v. Car Co., 5th App. D. C., 524.
McAfee v. Huidokoper, 9th App. D. C., 36.

“Every sentence or paragraph of charge need not state entire law applicable, it is sufficient if each statement taken in connection with the context is an accurate statement of the law.”

Lehman *vs.* District of Columbia, 19 App. D. C., 217.

In *Railroad vs. Varnell*, 98 U. S., 479, which went up from this jurisdiction, the court said:

“Inaccurate language and in some instances, incomplete sentences, were employed by the judge; but the court is not able to see that any error of law was committed, or that the errors of language committed were of such character as to warrant the conclusion that the jury was misled in respect to the legal rights of the parties. * * *

“Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in the appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done, the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law.”

The error is with the appellant, as further shown by the statement in her brief that the question before the court *was one of law* and not of fact. Appellant has assumed that the only legal presumption in the case is the possession of the deed by the grantee, and makes no mention of the other presumption arising by reason of the grantor retaining possession and control of the property and treating it as her own as long as she lived. We take up this matter and authorities later.

The case of *Bunten vs. The Trust Co.*, in 25th Appeals, cited by appellant as similar to the case at bar, need only be examined to distinguish it. There a trust was created by deed, and rights of third parties had intervened. The grantor afterwards attempted to recall the deed, which the

evidence showed had been delivered. That case is further cited to show that the court erred in directing the jury that the fact that the grantee failed to record the deed could be taken into consideration. The Buntten case held only that the failure to record a deed in no way affected it after a delivery had been made. But we find no case in which a failure to record could not be considered as bearing on the fact of delivery, for if recorded it is *prima facie* evidence of delivery.

The next portion of appellant's brief is a repetition of the argument to the jury, with the addition of a number of citations that do not meet the situation.

For example, in *Driscoll vs. Driscoll*, 143 Cal., 528, the evidence of delivery was direct and uncontradicted, and, furthermore, there the notary explained to the grantor that the deed would be an absolute transfer and the property would pass out of his hands.

In *Webb vs. Webb*, 104 N. W., 438, the grantor parted absolutely with control of the deed, and there was direct testimony as to delivery and subsequent declarations against interest.

In *Corley vs. Corley*, 2 Coldw., 520, the record showed that the grantor had on all occasions acknowledged the execution and existence of the deed and the grantee's title to it.

In *Merki vs. Merki*, 113 Ill. App., 518, the question was not whether there was a delivery, but to whom had the deed been delivered.

In *Creighton vs. Roe*, 218 Ill., 619, there was a deed from father to daughter which the father later attempted to set aside; but the evidence was undisputed that the grantor knew at the time that he was divesting himself of title.

In *McGee vs. Allison*, 94 Iowa, 527, three witnesses testified to the delivery, and in a part of that case, unquoted here by appellant, the court said that there must be not only a manual change of possession, but an intention on the part of the grantor to make it operate as such.

We leave the rest of the first assignment, the discussion of which pertains to points other than those involved here.

Second Assignment of Error.

In charging the jury, as recited in the plaintiff's exception to the charge, that they might consider, as tending to show the intent of Rebecca Thompson, the acts or conduct of Mrs. Walker after the manual delivery of the deed in question, such as her failure to record the deed and permitting Rebecca Thompson to collect the rents, pay taxes, and make repairs.

This assignment does not correctly state the court's charge, as an examination of the record (14) will show that the court said the "mutual conduct of the two."

That the court committed no error whatever in his charge, and particularly in that portion to which the plaintiff excepted, is clearly borne out by the authorities and would appear conclusive. Certainly the jury was the proper tribunal to determine whether the grantor intended to deliver the deed in question as a deed of real estate and thereby divest herself of title, as the authorities uniformly hold; and certainly it was proper for them to reach their conclusion from the acts of the grantor and the grantee; and certainly the grantee's acts in failing to record the deed and permitting the grantor to collect the rents, pay the taxes and insurance, and make repairs would have not only a direct bearing, but a strong probative force in reaching a proper conclusion.

We do not question that the possession of a deed, duly signed and acknowledged, raises a presumption of delivery when in the hands of the grantee, and that a *prima facie* case is made out by the plaintiff when such a deed is offered in evidence, and the court has so stated the law in his charge to the jury. He correctly told them that where the delivery is questioned and the facts and circumstances surrounding the delivery raise a doubt that there was an actual delivery, the presumption is rebutted and it becomes a part of the

plaintiff's case to prove that there was an actual delivery by which the title passed, and consequently the burden of proof is on him to show by the preponderance of evidence that such was the case.

This precise point was under consideration in the case of *Fitzgerald vs. Goff*, 99 Ind., 28.

That was an action involving the title to land claimed by the plaintiff, who asserted that the defendant was collecting the rents, and thereupon called upon the defendant to show title. The defendant claimed in a deed purporting to have been signed by the plaintiff, but which she claimed was never executed and delivered. The jury found for the plaintiff. The court of its own motion instructed the jury that it was incumbent upon the *defendant* to establish by a "fair preponderance of the evidence" that the deed from the plaintiff was duly executed and delivered. The defendant excepted to this instruction, and upon the same subject requested the court to instruct the jury that the *plaintiff* was bound to prove by a preponderance of the evidence that she never signed and executed the deed, and that it was only necessary for the defendant to introduce sufficient evidence upon the execution of the deed so as to justify the court in admitting it as evidence.

The court refused this instruction, and the appellate court held that the trial court did not err, and that upon the issue the evidence offered by the defendant for the purpose of making out a *prima facie* case in relation to the alleged execution and delivery of the deed relied upon, as would authorize the reading of such deed in evidence, did not in any manner or to any extent change the burden of the issue as to the execution and delivery of the deed, and that it was incumbent to establish by a "fair preponderance of the evidence" that the deed has been duly executed and delivered. Other instructions given by the trial court and excepted to were very similar to those given in the case at bar and were sustained.

In *Burkholder vs. Casad*, 47 Ind., 418, the plaintiffs asked the following prayer:

“The burden of proving delivery of the deed under which plaintiffs claim does not rest on the plaintiffs, but you are at liberty to find a delivery, unless the evidence introduced by the defendant overthrows the presumption of such delivery and convinces you that no such delivery was ever made or intended.”

The appellate court said (page 421):

“We do not think this is the law of the case. We think it is for a party claiming under a deed to show that the deed has been delivered. This may appear from evidence of an actual delivery or it may be inferred from the attending circumstances.”

• *As to the intent and mutual conduct:*

Weber vs. Christian, 121 Ill., 91, was an action in ejectment, and the delivery of a deed became the sole question, the court saying (page 97):

“We think, however, that the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done. This intent, of course, is to be gathered from the conduct of the parties, *particularly the grantor*, and all the surrounding circumstances.”

In *Hawkes vs. Pike*, 105 Mass., 560, the court said:

“A deed to real estate, in order to take effect as a conveyance of title, must be delivered by the grantor, and actually or by implication accepted as his own by the grantee. No definite or specific formality is prescribed by the law, *but it must be the concurrent act of two parties*. It must appear that the grantor parts with the control and possession of the instrument with the intention that it shall operate immediately as a transfer of title, and that it passes into the hands or is placed at the disposal of the grantee, or of some other person in his behalf.”

Curry *vs.* Coburn, 99 Wis., 319, was an action in ejectment, and the chief question litigated at the trial was whether the deed under which plaintiff claimed had ever been delivered, although in plaintiff's possession.

The court said:

"A deed never becomes operative until it is delivered with the intent that it shall become operative as a conveyance. Counsel for plaintiff argue earnestly that because the deed was handed by Fairchild to the plaintiff this constituted a full and complete delivery, and that evidence was not admissible to show that actual condition then existing. No doubt a great deal of discussion and unnecessary refinement may be found in the books bearing upon this question; but the main principle must predominate, that, to constitute a valid delivery of a deed, the grantor must part with his dominion over it with *intent to pass the title.*"

In Hill *vs.* McNichol, 80 Me., 209, the primary question was whether a deed had ever been delivered.

There the grantor deeded his property to his son. After the son's death a deed from the son to the mother was produced by her. The court held that there was no delivery, and among other things said that prior and subsequent to the date of the latter's deed—

"the property remained in the father's possession and under his management, by himself, and through his son, precisely as if never by him or his son conveyed. His wife had no money to pay for it and evidently paid nothing for it. It was never in the lifetime of her husband taxed to her, nor insured in her name, nor did she before his death collect any rents, or attempt to claim or claim to, nor were any collected on her account or in her name. In no way did she assert, by any word or act disclosed in the case, any claim under the deed while either the son or husband was alive."

In *Stewart vs. Stewart*, 50 Wis., 445, there was no visible change in the control or management of the land after the execution of the deed; it was assessed against the grantor until his death and the receipts for taxes were found among his papers. Held, that the presumption of delivery was rebutted.

The court said:

“Undoubtedly the possession of the deed by the grantees is presumptive evidence of the delivery thereof by the grantor, and the *onus probandi* is on him who denies the delivery, to rebut the presumption by proof. * * * We think the presumption of delivery arising from the appellant’s possession of the deed is rebutted by the evidence of the relative situation of the parties to each other and to the land in controversy.”

The presumption of a delivery of a deed arising from its being recorded is rebutted by proof that the grantee never was in possession, nor claimed under the deed, that the land was valuable only for its use and occupation, and that the grantor, his heirs and representatives, have remained in undisturbed possession without recognizing any rights under the deed. Non-delivery, or else a reconveyance, is then presumed.

Knolls vs. Barnhart, 71 N. Y., 474.

Merely making, acknowledging, and handing to grantee is not a delivery of the deed, where, with knowledge and acquiescence of the grantees, the grantor afterward paid taxes and made repairs on the property and collected and used all rents.

Wilson vs. Wilson, 158 Ill., 567.

Brown vs. Brown, 167 Ill., 637.

Wilenou vs. Handlon, 69 N. E., 892.

Mannix vs. Riordan, 75 N. Y. App., 135.

The action of the parties in relation to the land at the time of and subsequent to the execution of the deed are competent evidence of both delivery and acceptance.

Ross *vs.* Campbell, 73 Ga., 309.

Shields *vs.* Bush, 189 Ill., 534.

Stewart *vs.* Weed, 11 Ind., 92.

Richardson *vs.* Grays, 85 Iowa, 149.

Dikeman *vs.* Arnold, 78 Mich., 455.

Woods *vs.* Sturdevant, 38 Miss., 68.

Dukes *vs.* Spangler, 35 Ohio St., 119.

Walsh *vs.* Vermont Ins. Co., 54 Vt., 351.

Lovejoy *vs.* Lovett, 124 Mass., 270.

If the grantor intended that the title pass *eo instanti* upon execution to the grantee, it is a deed, and this although the enjoyment is postponed until after the death of the grantor. If the grantor intended that the title should not pass until after his death, it is a will, for a deed cannot be ambulatory in character.

9 Amer. Eng. Enc., p. 91, and long list of authorities in note 6.

Third Assignment of Error.

In granting the appellees' motion, made during the trial, to strike out the answer of the witness, Alice Dod Walker, to the last interrogatory attached to her deposition, and to rule out said answer, and in instructing the jury to disregard it.

The interrogatory and answer were as follows:

"Q. 13. Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at *this* issue in this case, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at length in your answer. A. In answer to this

interrogatory I would say that even during the lifetime of her nearest relatives, her brother and his family, Rebecca used to often say that she wished my family to have her house on O street. She made a will some years ago, leaving the house to my mother, for the reason that the money with which the property was purchased had been obtained from our family, but fearing there might be some trouble about that, she had that will destroyed and had the deed drawn up conveying the property to my mother."

It can hardly be seriously contended that this answer is unobjectionable, and that the jury should have been allowed to consider it. It does not appear that the declarations alleged to have been made by the grantor were made to the witness. The time in which they were made is not fixed. The witness states that the money with which the property was purchased was obtained from her family, whereas the witness, by her answers to the other interrogatories, shows that she was less than four years old when the grantor purchased the property, and consequently her information is hearsay on its face. Furthermore, the source of the purchase-money is immaterial and irrelevant. Certainly any statement that the grantor made years before the transaction in question is not admissible to show the state of her mind at the time of the transaction, and the fact that she had such intention has no bearing on a final act unless it is a part thereof. The mind of a man may be changed at any time and repeatedly and cannot be taken as a criterion of his state of mind at the time of the completion of the act and can have no bearing thereon. In a certain class of cases, where the intent is the primary fact under consideration, as in cases of domicile and gifts, where there had been a manifestation of such intent at some prior time, such declarations are admissible, but not in cases like the present.

In 16 Cyc., 1184, the law is stated as follows:

"Declarations of intent are admissible in those, and only in those, cases where the existence of the par-

ticular mental state is a relevant fact at the time to which the declarations relate. They are not direct evidence of the facts asserted."

We find no case involving the delivery of a deed in which the declaration made by the grantor long before had been admitted as evidence to show his intention at the time of the passage of the deed. In fact, the cases in which the point has been raised were decided adversely to the plaintiff's contention. Such declarations have been admitted as parts of the *res gestæ*, when admitted at all.

In *Price vs. Hudson*, 125 Ill., 284, which involved the delivery of the deed, the court said:

"The intention to deliver, on the one hand, and acceptance, on the other, may be shown by direct evidence of the intention, or may be presumed from oaths or declarations of the parties constituting part of the *res gestæ*, which manifest such intention. In a like manner the presumption of delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises."

In *Simpkins vs. Smith*, 95 Ind., 470, which was a suit to set aside conveyance, the appellant called a witness by which she proposed to prove that her father had stated to said witness, before making the deed to the husband, that he intended to give her forty acres of land, and after making the deed stated he had given her the land. The statements were held hearsay and inadmissible.

In *Carter vs. Buchannon*, 3 Ga., 513, where the defendant claimed property as a gift, declarations of donor on the evening of the same day on which the alleged gift was made, going to show there was a gift, the court said:

"It is well settled that the acts of the party, or the facts or circumstances or declarations which are sought to be admitted in evidence, are not admissible unless they grow out of the principal transaction,

illustrate its character and are contemporary with it.
 * * * An indispensable characteristic of declarations is that they must be made at the time of the act done which they are supposed to characterize; and, further, they must be calculated to unfold the nature and quality of the facts they are intended to explain, and so harmonize with them as obviously to constitute one transaction."

In the case of *Colan vs. Grace*, 36 Minn., 276, which involved the question of delivery of a deed, the declarations of the grantor were sought to be introduced. It was claimed that the court erred in refusing to admit in evidence the answer made by the grantor concerning the deed upon her return to another room after signing it.

The appellate court said:

"The evidence would have been mere hearsay. The declaration was in no way connected with the main fact in issue. There is nothing to show that it was made at the time of either signing or acknowledging the deed."

This question arose in *Aguirre vs. Alexander*, 58 Cal., 21, which was an action of ejectment. There a conversation between the deceased and a witness for the plaintiff, in which the deceased stated that he wanted to leave to his wife and family certain land that belonged to him, was admitted in evidence over objection. The court, on page 25, said:

"It is undoubtedly true as a legal proposition that verbal as well as written declarations of a party to a transaction are admissible when they accompany some act, the nature, object, or motive of which is the subject of inquiry. *But they must be contemporaneous with the act to which they were intended to give character.* The declarations in evidence do not conform to that rule. They do not grow directly out of the act of José Antonio in the execution and delivery of his deed to Olivera, for the purpose of conveying the land to his wife; nor does it appear

that any of them were made during the continuance of the act, or at or immediately after its performance. The first of them appears to have been made at some uncertain time before the making of the deed; the second on a day when the actor came to Los Angeles, and the third at some time subsequently to the act. The first is not connected with the act, because the form of the act was then unknown to the actor; the second and the third were isolated connections, one of which related to the manner of doing the act which he contemplated performing, and the other to the act after it had been performed. The exact time when any of them was made does not appear; there is nothing in the testimony from which it can be inferred that any of them were contemporaneous with the fact under consideration.

"They can therefore be considered only as mere hearsay. It was therefore error to overrule the objections to such testimony."

See also *Kingsford vs. Hood*, 105 Mass., 495.

Badger vs. Story, 16 N. H., 168.

The intention to deliver may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations, of the parties constituting parts of the *res gestæ*.

Jammel vs. Mann, 80 Ill. App., 288.

Hale vs. Hills, 8 Conn., 58, was a case directly in point. The question there was whether a deed upon which plaintiff relied in an action of ejectment had ever been delivered. Plaintiff sought to prove that the grantor had several times prior to time of alleged delivery declared his intention to deliver a deed. The court said, on page 42:

"An intention to do an act affords no proof that the act was done. * * * The only mode in which an intention to deliver a deed has been admitted in evidence is when it accompanies the actual delivery and thus becomes a part of the *res gestæ*."

While some of the cases cited in this brief are proceedings in equity, any matter that would entitle defendants to relief therein may be availed of as defense in actions of ejectment.

Maulsby vs. Baker, 3 Mackey, 65.

Burlonri vs. Moores, 5 App. D. C., 35.

In conclusion, we submit that after a careful consideration of the record and an examination of the authorities in point, it will be seen that the trial court committed no error and the judgment should be affirmed.

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